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No. 986

IN THE

Supreme Court of the United States

October Term, 1969

FRED JOSEPH WHITE
Petitioner,

VERSUS

STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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IN THE

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Petitioner

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STATE OF OKLAHOMA
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The petitioner, Fred Joseph White, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered in the above case on the 30th day of July, 1969.

OPINIONS BELOW

The Court of Criminal Appeals of the State of Oklahoma issued its opinion on the 30th day of July, 1969, and is officially reported at Okl. Cr., 458 P. 2d 322 (1969), and is also attached hereto as Appendix A, infra, p. 13.

The District Court of Creek County, State of Oklahoma, issued no opinion, said judgment being based entirely upon the Court's findings of the defendant's (petitioner herein) guilt based on the evidence introduced and arguments heard.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma was pronounced as aforesaid on the 30th day of July, 1969. Petitioner's Petition for Rehearing was denied on the 17th day of September, 1969. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3), in that a right, privilege and immunity is specially set up or claimed under the Constitution of the United States.

Article 7, Section 1 of the Constitution of Oklahoma provides:

> "The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions." * * *

Under 20 Oklahoma Statutes 40 the following provisions place the appellate jurisdiction of all criminal cases in the Court of Criminal Appeals of the State of Oklahoma, to-wit:

> "The Criminal Court of Appeals shall have exclusive appellate jurisdiction, co-extensive with the limits of the State, in all criminal cases appealed from the District, Superior and County Courts, and such other courts of record as may be established by law."

It is well settled that when the Court of Criminal Appeals was established by law with exclusive appellate jurisdiction in criminal cases, such jurisdiction ceased on the part of the Supreme Court of Oklahoma and the Court of Criminal Appeals became in fact and in law the Supreme Court of the State of Oklahoma in all criminal cases. *Corley v. Adair County Court*, 10 Okl. Cr. 104, 134 P. 835 (1913); *Buck v. Dick*, 27 Okl. 854, 113 P. 920 (1911).

On the 17th day of September, 1969, the Court of Criminal Appeals of the State of Oklahoma issued an Order Denying Petition for Rehearing, attached hereto in Appendix B, infra, p. 24. The Court of Criminal Appeals of the State of Oklahoma thereby made the judgment final, in that under Rule 17 of that court, no further motions or applications for rehearing or review on behalf of the petitioner could be filed in said court. Except, the court issued an Order Staying Mandate Pending Appeal to United States Supreme Court on the 24th day of September, 1969, attached hereto in Appendix C, infra, p. 25.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the trial court errored in allowing a witness to testify to statements made by Petitioner White while he was confined in a hospital and under medication in view of the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right of due process?

2. Whether the trial court errored in overruling petitioner's motion for a continuance due to the absence of a material witness, and whether the trial court abused its discretion in so doing?

3. Whether the trial court errored in continuingly sustaining objections by the District Attorney to testimony offered by the petitioner as a defense in view of the right to a fair trial and the right to due process under the Fifth and Fourteenth Amendments?

4. Whether the trial court errored in refusing to give jury instructions on a theory of defense as requested by petitioner, and whether the trial court abused its discretion in so doing?

5. Whether the trial court errored in allowing the District Attorney to amend the information on the day of the trial without a subsequent preliminary hearing in view of the jurisdiction of the court and the right to due process under the Fifth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution as it states that one shall not be compelled in any criminal case to be a witness against himself and that no one shall be deprived of life, liberty, or property, without due process of law, is made obligatory on the states through the Fourteenth Amendment. The Fourteenth Amendment, in part, states that no State shall deprive any person of life, liberty, or property, without due process of law. These are the provisions involved in this petition.

STATEMENT

The petitioner, Fred Joseph White, was charged in the District Court of Creek County, State of Oklahoma, with the crime of Manslaughter in the First Degree. The Information specifically alleged that on the 12th day of July, 1967, the petitioner, while driving under the influence of intoxicating liquor, at a high speed, failed to drive to the right, and was involved in an accident causing the death of five (5) people. On the 12th day of December, 1967, the day of the trial, the State moved to amend the Information by striking the last four (4) names of persons killed in the accident, leaving only the name of Estella Chappelle. In a hearing before District Judge Hughes, the State's motion to amend the Information was denied. However, later the same day before District Judge Miracle, and after the jury had been empaneled, the State was allowed to so amend. The trial proceeded immediately, and on the same

day the jury returned a verdict of guilty, and fixed the petitioner's punishment at four (4) years in the State Penitentiary at McAlester. On the 19th day of December, 1967, the Petitioner filed a Motion in Arrest of Judgment and a Motion for New Trial which were overruled by the Court. That same day, the Court entered a formal judgment and sentence in accordance with the verdict of the jury. The petitioner then perfected an appeal to the Court of Criminal Appeals for the State of Oklahoma.

The Court of Criminal Appeals of Oklahoma affirmed the conviction on the 30th day of July, 1969. On the 17th day of September, 1969, the Court denied the Petition for Rehearing, and on the 24th day of September, 1969, the Court issued an Order Staying Mandate Pending Appeal to United States Supreme Court. Petitioner has no further remedy for appellate review in the State Courts of Oklahoma.

FEDERAL QUESTIONS RAISED

In the District Court of Creek County, State of Oklahoma, the petitioner objected to the admission of testimony concerning statements made by Petitioner White while in a hospital under medication on the ground that he may not have known what he was saying. The Court promptly overruled such objections. (C.M. 165) Petitioner made a Motion for Mistrial based on the ground that through the Court's sustaining State's objections, the defense was not able to produce its case in chief. The Court also overruled

this motion (C.M. 237-238). Furthermore, petitioner made objections to the Court allowing the State to amend its Information since it was the day for trial and no preliminary hearing was held. This objection was overruled. (C.M. 28)

In the Court of Criminal Appeals for the State of Oklahoma, Petitioner White raised each of these questions, among others, in his Petition in Error which has been made a part of this record. Also, in the Brief for Petitioner in Error, it was stated that the admission of certain statements by the petitioner was a violation of the Fifth Amendment privilege against self-incrimination and the right to due process. (Brief 1-3) The Court of Criminal Appeals found (Opinion 4-5) from the record that the statements were voluntary and therefore admissable. Moreover, in the Brief for Petitioner in Error, it is asserted that the Court's sustaining State's objections to defense testimony was a violation of the right to a fair trial and lack of due process under the Fifth Amendment. (Brief 5-6) The Court passed upon this matter by saying that the questions were immaterial and therefore properly objected to. (Opinion 4) Also in that Brief, petitioner presented the question that the Courts did not have the jurisdiction over the petitioner because he had not been given a hearing on the amended Information. (Brief 9-11) As to this position, the Court found that petitioner was not prejudiced and thereby not entitled to a hearing. (Opinion 1-2)

Furthermore, in the Reply Brief for Petitioner White in the Court of Criminal Appeals, it was again asserted

that the admission of the inculpatory statements made while petitioner was in the hospital was a violation of the Fifth Amendment privilege against self-incrimination. (Reply Brief 1-2) It was also raised that the trial court had no jurisdiction since a hearing on the amended Information was not permitted. (Reply Brief 2-3) The Court held contrary to these propositions as stated above. In the petitioner's Petition for Rehearing, it was further asserted that a denial of a preliminary hearing on an amended Information was a denial of due process under the Fifth and Fourteenth Amendments. (Rehearing Petition 3-4) The Court of Criminal Appeals, without an opinion, denied petitioner's Rehearing Petition.

FACTS MATERIAL TO QUESTIONS

After the automobile accident, Fred Joseph White was confined to a hospital for treatment. While there, and while being visited by Rev. Thomas O. Chappelle, petitioner did make certain inculpatory statements which the Court allowed to be admitted into evidence over objection. (C.M. 165)

During the course of the trial, the petitioner moved for a continuance because of an absent material witness. (C.M. 27a, 27b, 234) The petitioner executed an affidavit (C.M. 20) and a subpoena (C.M. 27) for the attendance of this witness, and asserted that he was material. (C.M. 57, 66) The motion was overruled by the Court. (C.M. 27a, 27b, 234).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in the instant case because important questions, affecting the prosecution of criminal cases and the rights of an accused under the Fifth and Fourteenth Amendments, are involved. The situation in the instant case presents several issues regarding the basic fundamental rights of an accused in a criminal proceeding.

The evidence admitted against petitioner violates his right against self-incrimination under the Fifth Amendment and is a violation of due process in that inculpatory statements made by the petitioner while in hospital care were not thoroughly scrutinized in light of their voluntary nature. The Oklahoma Court of Criminal Appeals has itself held in *Brown v. State*, 384 P. 2d 54 (1963) that before a statement is voluntary, it must be spontaneous and free from any extraneous influence or disturbing cause. This Court should grant review because the question of the petitioner's mental condition and free will was passed on much too summarily. More attention should have been given to whether the admission of these statements was a violation of one's privilege against incriminating himself when they were made in such a dubious mental condition. The Supreme Court of Florida in *Reddish v. State*, 167 So. 2d 858 (1964), held that the Court should give very close attention to the physical and mental condition of a declarant in order to avoid the constitutional prohibition against self-incrimination. Petitioner White suggests that this Court

should grant review of this case so as to preclude state courts from passing too lightly over fundamental rights of accused persons.

This Court should accept review of this cause for the further reason that at the trial level, the proceedings were completely controlled by the Judge and State's attorney. Petitioner was denied due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments in that he was not permitted to put on his evidence in support of his defense theories. The Supreme Court of California held in *People v. Kilhoa*, 349 P. 2d 673 (1960) that when the prosecution so controls the proceedings in a manner so as to prevent the accused from presenting evidence, then this would amount to a denial of a fair trial and due process. Petitioner White suggests that this Court should grant review of this case in order to uphold human rights that may be violated by courts too eager to convict.

Finally, this Court should take review of this case because of the attack on jurisdiction that has been overruled below and is fundamental in every criminal case. By the case of *Petition of Dare*, 370 P. 2d 846 (1962), the Oklahoma Court of Criminal Appeals has stated that a trial court can lose jurisdiction if the proceedings violate fundamental rights of an accused and without a waiver of same. Since petitioner was not afforded a hearing on the amended Information, this goes to the jurisdiction of the Court which is basic component of all criminal procedure and should be considered by this Court. Furthermore, a

United States District Court for Oklahoma held in *Goodwin v. Page*, 296 F. Supp. 1205 (1969), that according to Oklahoma law, the denial of a preliminary hearing constitutes lack of due process under the Fifth and Fourteenth Amendments. Again, this is a very basic element in criminal procedure that has been passed upon much too summarily by the lower courts and is due detailed consideration by this Court.

The questions presented by this case are of great and recurring significance in the administration of criminal justice in the state courts and the importance of constitutional rights of one accused of a crime. Due to the gravity of the questions involved here, this case is peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully,

ROEHM A. WEST
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Tulsa, Oklahoma

Counsel for Petitioner

October Term, 1969

APPENDIX

Appendix A

Opinion of Court of Criminal Appeals filed July 30, 1969.

Appendix B

Order Denying Petition for Rehearing filed September 17, 1969.

Appendix C

Order Staying Mandate Pending Appeal to Supreme Court of United States, filed September 24, 1969.

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA No. A-14,767

FRED JOSEPH WHITE
Plaintiff in Error

VERSUS

THE STATE OF OKLAHOMA
Defendant in Error

—SYLLABUS—

1. An information may be amended in matters of either form or substance when it can be done without prejudice to the substantial rights of the accused. No amendment shall cause any delay in the trial unless for good cause shown by affidavit.
2. The statute authorizing the clerk or prosecuting attorney to read the information and then state the plea of the defendant to the jury is directory and not mandatory; and this is not grounds for a mistrial or reversal where no objection is made at the time of the omission to state defendant's plea.
3. Testimony regarding a conversation with the defendant about the crime is not inadmissible where there is no showing that the defendant was irrational, under drugs, incompetent, or in any condition which would make his statements other than voluntary.
4. A Motion for Continuance is addressed to the sound discretion of the trial court. It is not error to refuse a continuance sought so that a witness may be produced where his testimony would only be cumulative and where it appears that counsel did not diligently pursue attendance of the witness.

5. Where the approved instructions as a whole cover the law of the case, the refusal of incorrect or inapplicable requested instructions is not reversible error.
6. Instruction setting out statute on which prosecution was based practically in language of the statute is not erroneous.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA
HONORABLE JESS I. MIRACLE, JUDGE

FRED JOSEPH WHITE was charged, tried and convicted of the crime of Manslaughter in the First Degree, was sentenced to four years imprisonment, and appeals. AFFIRMED.

OPINION BY BUSSEY, J.,
TOM BRETT, P. J. and
NIX, J. Concur.

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Attorney for Plaintiff in Error,

G. T. BLANKENSHIP, ATTORNEY GENERAL,
DUANE LOBAUGH, ASST. ATTY. GENERAL,
Attorneys for Defendant in Error.

BUSSEY, J.:

Fred Joseph White, hereinafter referred to as defendant, was convicted in the District Court of Creek County for the crime of Manslaughter in the First Degree and was sentenced to serve four years imprisonment in the State Penitentiary at McAlester. The Information specifically alleged that on July 12, 1967, the defendant, while driving under the influence of intoxicating liquor at a high speed, failed to drive to the right of the center of the road and was involved in an accident causing the death of five persons. On the day of the trial, the State moved to amend the Information by striking the names of four people killed in the accident, leaving only the name of Estella Chappelle. The case was tried on December 12, 1967, before the

Honorable Jess I. Miracle, District Judge, with the State represented by Mr. David Young, District Attorney, and his assistant, Mr. Tom Lucas, and the defendant represented by Mr. Guy W. Fitzsimmons. The jury on the same date returned its verdict of guilty as charged. On December 19, 1967, defendant's Motion in Arrest of Judgment and Motion for New Trial were overruled and the court entered judgment and sentence in accordance with the verdict of the jury, from which defendant has perfected this appeal.

The defendant, by his counsel on appeal, has raised several assignments of error, which are mainly conclusionary allegations without merit and unsupported by citation of authority, but which we will consider in order of their occurrence in the record.

We first note defendant's contention that it was error for the trial court to allow the District Attorney to amend the Information on the day of the trial since the defendant was prejudiced thereby. The record indicates that prior to the beginning of the trial the District Attorney made a motion for leave to amend the Information which was granted by Judge Miracle. This amendment to the Information consisted of removing the named of four of the five people killed in the accident. Thus, the defendant was tried on the basis of the death of Estella Chappelle only. Defendant argues that this amendment to the Information prejudiced him and that he was thereby tried on a felony without the benefit of a preliminary examination on the charge. We find no merit to the contention of the defendant. There was no substantial change in the Information which could have operated to surprise the defendant, materially affect his defense, or otherwise injure his case. No only does the Court fail to see how the defendant was

prejudiced by the amending of the Information, but the defendant fails to set out in what way he was prejudiced by the amendment to the Information. In *Herren v. State*, 72 Okl. Cr. 254, 115 P. 2d 258 (1941), this Court held in the fifth paragraph of the Syllabus as follows:

> "An information may be amended in matters of either form or substance when it can be done without prejudice to the substantial rights of the accused. No amendment shall cause any delay in the trial unless for good cause shown by affidavit." 115 P. 2d, at 259.

Defendant did not show good cause for delay or how he was prejudiced, either to the trial court or this Court on appeal, and we accordingly find this assignment of error to be without merit.

Defendant next asserts as error the failure of the District Attorney to state the plea of the defendant after he had read the Information to the jury. In support of his position the defendant cites 21 O.S. 1961 § 831, which, in providing for the order of trial proceedings, provides that after the indictment or information has been read, the Clerk or District Attorney shall state the plea of the defendant to the jury. With reference to this statute, this Court held in *Ethridge v. State*, Okl. Cr., 418 P. 2d 95 (1966):

> "The statute above quoted authorizing the clerk or the county attorney to read the information and state the plea of defendant to the jury is directory and not mandatory.
>
> It is not error alone that requires reversal, but error plus injury." 418 P. 2d, at 97.

Not only does the record fail to disclose an objection by the defendant at the time of the omission by the District Attorney, but we fail to see how the defendant could have been prejudiced by this technical oversight of a directory nature. Accordingly, we reject this contention as being

without merit, for no injury as a result thereof can be found.

Regarding the evidence, the record indicates that the State called sixteen witnesses and the defendant called six witnesses including himself. The testimony indicated that prior to the same accident, which occurred a short distance out of Sapulpa, defendant was seen in Sapulpa by numerous people, appeared to be "tight," and most having formed the opinion that defendant was in no condition to be driving. Defendant was found at the scene of the accident, behind the wheel of his automobile which had struck the car left of center in which the deceased was a passenger. There was also testimony that the defendant's car shortly before the accident, had been seen being driven in a reckless manner. There is no controversy that the defendant was driving the automobile, which struck the car in which the deceased was a passenger. However, defendant testified that he had only had three beers on the night of the accident and that during the evening he had drunk some coffee neutralizing the effect of the beers.

Defendant cites as error the trial court's sustaining the objections of the prosecuting attorney to certain examination of witnesses attempted by defense counsel. Defendant contends that this prevented him from examining witnesses in order to establish his theory of defense. The Court has carefully reviewed the portion of the record in question and finds that the questions asked by the defense counsel required hearsay answers or were immaterial, and we find that the trial court properly sustained the objections of the prosecuting attorney. Defendant contends that he was attempting to impeach one of the State's witnesses who had been in the company of the defendant prior to the accident. While it is permissible for counsel to impeach a witness, he cannot do so through hearsay or immaterial matters.

Another assertion of error by the defendant was the

trial court's allowing a State's witness, Rev. Thomas O. Chappelle, to testify regarding his conversation with the defendant in the hospital while he was recovering from his injuries after the accident. The defense counsel contends that the defendant at the time of his conversation with the witness was under sedatives and narcotics for severe pain and that his physical and mental condition made him unaware of the possible results of his conversation and admissions. Counsel then concludes that there was error since it was not clearly demonstrated at the trial that the defendant had the capacity to determine the possible outcome of his admissions. The testimony in question was between witness Chappelle and the defendant on July 24, 1967, some twelve days after the accident. Witness Chappelle testified that he had been contacted by a minister on behalf of the defendant who wanted to talk to Chappelle about the accident. Witness Chappelle testified that the defendant in referring to the accident said that he was drunk, regretted the incident, and asked how he could repay for loss of lives involved.

From a review of the record we find no indication that the defendant at the time of this admission was under the influence of drugs or in such a mental condition as to be unaware of his statements. Defense counsel suggests that the defendant was under drugs; however, no effort was made to establish the fact that the defendant was under drugs at the time of his conversation with witness Chappelle. Nor was there any other offer of evidence by the defendant that he was not rational at the time he made the statements. Granted, an accused's mental and physical condition at the time that he made statements may be challenged (22A C.J.S., § 720, #1034), there was no evidence which would conflict with the assertion that the defendant was rational at the time that he made the

statements. Defense counsel offers no conflicting evidence. The ultimate test of a confession is its voluntariness and statements against interests are admissible if they can withstand this test. *In Re Pate's Petition*, Okl. Cr., 371 P.2d 500 (1962). The record indicates that the defendant was rational, and we find no evidence to the contrary. We therefore conclude that the statements made by the defendant to witness Chappelle were voluntary and therefore admissible.

Defendant further cites as error the trial court's failure to sustain his Demurrer to the evidence and that the verdict was not sustained by the evidence. In view of the record, which amply supports the conviction, we find that these contentions are wholly without merit. The State did, indeed, prove that the defendant was guilty of a misdemeanor, driving while intoxicated, which resulted in a death. Defendant implies, without express assertion, that the defendant could have been intoxicated or under influence of drugs other than his own voluntary consumption of intoxicating beverages. The State amply proved that the defendant had voluntarily consumed intoxicating liquor and that he was intoxicated prior to the accident. We conclude that the evidence was not subject to demurrer, and was sufficient to support the verdict.

Defendant further asserts that it was error of the trial court to overrule his Motion for Continuance and mistrial due to the absence of a material witness for the defense. In the presentation of the defendant's case, defense counsel called Paul Sikes who failed to appear. The defendant then moved for a continuance. The Motion was overruled by the court with the remark that the possible non-attendance of this witness had been called to the attention of defense counsel previously and that defense counsel

failed to notify the court if he desired action taken to secure the attendance of this witness. Defense counsel then moved for a mistrial for the reason that the defendant was not allowed a continuance for the purpose of obtaining the presence of a material witness. Defense counsel argued to the trial court that this witness would testify that he was with the defendant prior to the accident, why the defendant had been allowed to drive his car home, and that it was his opinion that the defendant was not able to drive. The trial court ruled that this would be merely cumulative of evidence already presented. After a review of the record, we find no error in the rulings of the trial court. This Court has held that it is not error to refuse a continuance sought so that a witness may be produced when the evidence sought to be admitted would be merely cumulative. *Pitts v. State*, Okl.Cr., 431 P.2d 449 (1966). In *Graham v. State*, Okl. Cr., 275 P.2d 1020 (1954), this Court affirmed the conviction for operating a motor vehicle while under the influence of intoxicating liquor and held in the second paragraph of the syllabus as follows:

> "A motion for continuance is addressed to the sound discretion of the trial court. When the testimony of the witness would probably not change the result, it is not error to overrule the motion." 275 P.2d, at 1021.

We therefore conclude that there was no error in the denial of defendant's motion for continuance or mistrial due to the absence of a material witness.

It is defendant's further contention that it was error for the trial court to refuse defendant's requested Instruction Number One. This requested instruction reads as follows:

> "You are further instructed that, should you find,

or even have a reasonable doubt thereon, that the defendant, at the time of the incident involved herein was intoxicated, or that his mind was bereft of reason by the recent use of some drug or narcotic, but that his intoxication of aforesaid mental condition has been produced by the artifice or fraud of the deceased or other persons, and should you further find, or have a reasonable doubt thereon, that said intoxication or said mental condition brought about by the use of drugs or narcotics administered as aforesaid, was to such an extent as to absolutely destroy the reason of the defendant for the time being, as far as his knowledge of his acts is concerned, that is, placed the defendant in such mental condition that he had no knowledge of the nature or character of his acts, and was not able to discern and know whether the same was right or wrong, and adhere to the right and avoid the wrong, then in such event, if the defendant committed the act charged in the information, you should acquit him."

It is a well established rule that where the approved instructions as a whole cover the law of the case, the refusal of incorrect and inapplicable requested instructions is not reversible error. *Wilson v. State*, 28 Okl.Cr. 102, 228 P. 1108 (1924). In *Holt v. State*, Okl.Cr., 278 P.2d 855 (1955), this Court held:

> ". . . (T)he jury must be advised of defendant's theory of defense where there is evidence to support it, even though such evidence is discredited. The question is a fact one for the determination of the jury, and it is the function of the jury to weigh the evidence." 278 P.2d, at 857.

The import of the defendant's requested instruction seems

to be that his intoxication or mental condition was caused by deception of other persons, rather than voluntary intoxication and that his condition, brought about by the use of drugs or narcotics administered by fraud, was such as to absolutely destroy the reason of the defendant. After a careful review of the evidence, we find no evidence whatsoever to indicate that anyone at any time before the accident administered any drugs or narcotics to the defendant. Nor is there any evidence in the record that the defendant's intoxication or mental condition was the result of anything other than his own voluntary intoxication. Since there was no evidence to support the theory that "other persons" had administered drugs or narcotics by fraud to the defendant, the trial court wisely and within its sound discretion denied the requested instruction of the defendant which was at best inapplicable.

It is defendant's further contention that Instruction Number Six given to the jury by the trial court was reversible error because it was an improper statement of the law. Instruction Number Six as given to the jury reads as follows:

> "You are instructed that the law of this State provides: 'It shall be unlawful for any person who is under the influence of intoxicating liquor, to operate or drive a motor vehicle on any thoroughfare, highway, country road, state highway or state road, public street, avenue, public park, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

Title 47 O.S. 1961, § 11-902(a), provides as follows:

> "It is unlawful and punishable as provided in paragraph (c) of this section for any person who is under

the influence of intoxicating liquor to drive, operate, or be in actual physical control of any motor vehicle within this state."

It is true that Instruction Number Six is not an identical quote of the statute; however, it can hardly be said that Instruction Six is a mis-statement of the law, since the only variance from the statutory language concerns the language "to operate or drive a motor vehicle on any thoroughfare, highway, country road, state highway or state road, public street, avenue, public park." This description of where the motor vehicle should not be operated is a former version of this statute. An instruction setting out the statute on which the prosecution is based, practically in language of the statute, is not erroneous. *Sharp v. State*, Okl.Cr., 407 P.2d 593 (1965). Although an instruction defining a statutory offense should be in the terms of the statute, it is sufficient if it is in words of similar import. *Powell v. State*, 83 Okl.Cr. 194, 174 P.2d 929 (1947). Therefore, although the court's instruction used the language of a former version of the statute, the instruction was an adequate statement of the law as it existed at the time of the trial, and in no way was an inaccurate or misleading statement of the law which could prejudice the defendant.

Having reviewed the record, we find that the evidence is sufficient to sustain the conviction and that the errors complained of by the defense are without merit or sufficient import to require reversal or modification. Accordingly, the judgment and sentence imposed in the District Court is hereby AFFIRMED.

TOM BRETT, P.J. and
NIX, J. Concur.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-14,767

FRED JOSEPH WHITE
Plaintiff in Error,

VERSUS

THE STATE OF OKLAHOMA
Defendant in Error,

ORDER DENYING PETITION FOR REHEARING

NOW on this 17th day of September, 1969, this Court having carefully examined the Petition for Rehearing filed herein in the above styled and numbered cause, and being fully advised in the premises, is of the opinion that said Petition should be, and the same is hereby, DENIED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of September, 1969.

/s/ TOM BRETT, PRESIDEING JUDGE

/s/ HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-14,767

FRED JOSEPH WHITE
Plaintiff in Error,

VERSUS

THE STATE OF OKLAHOMA
Defendant in Error,

ORDER STAYING MANDATE PENDING APPEAL TO UNITED STATES SUPREME COURT

WHEREAS, plaintiff in error, Fred Joseph White, has filed his application for this Court to stay the issuance of the mandate in the above styled and numbered matter, pending plaintiff in error's appeal to the United States Supreme Court for issuance of the Writ of Certiorari; and,

WHEREAS, plaintiff in error has heretofore filed his petition for rehearing in this Court, which was denied on the 18th day of September, 1969; Now therefore, the Court finds the issuance of the mandate herein should be stayed, as prayed for in plaintiff in error's showing of good faith in the matter of perfecting his said appeal to the United States Supreme Court; and upon such showing of good faith being made, and upon further application of plaintiff in error, the issuance of said mandate may be further stayed, as provided for in the appropriate statutes.

DONE this 24th day of September, 1969.

/s/ TOM BRETT, Presiding Judge

ATTEST:

CLERK